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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE VINCE CHHABRIA, JUDGE

JESSE PEREZ,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. C 13-5359 VC
	)	
J. PRELIP, et al.,	)	
	)	San Francisco, California
Defendants.	)	Monday
	)	October 26, 2015
	)	1:37 p.m.

TRANSCRIPT OF PROCEEDINGS

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Reported by: BELLE BALL, CSR #8785, RDR, CRR  
Official Reporter, U.S. District Court

1 **MONDAY, OCTOBER 26, 2015**

**1:37 P.M.**

2 **P R O C E E D I N G S**

3 **THE CLERK:** Calling Case No. 13-CV 5359, Perez versus  
4 Prelip, et al.

5 Counsel, please step forward and state your appearances  
6 for the record.

7 **MR. BENEDETTO:** Matthew Benedetto from the law firm  
8 of WilmerHale on behalf of the Plaintiff Jesse Perez.

9 **THE COURT:** Good afternoon.

10 **MR. LEE:** Good afternoon, Your Honor. Randall Lee  
11 for Mr. Perez.

12 **THE COURT:** Good afternoon.

13 **MS. MORAN:** Katie Moran for Mr. Perez.

14 **THE COURT:** Good afternoon.

15 **MS. NYGAARD:** Jennifer Nygaard from the Attorney  
16 General's office for Defendants.

17 **MR. SEALS:** Elliott Seals for the Defendants.

18 **THE COURT:** Good afternoon. Okay. Why don't we talk  
19 first, I guess, about the motions in limine.

20 I will say -- we can sort of hold off discussion on this,  
21 but in the thinking about the motions in limine, it struck me  
22 that it might be a good idea, the defense has suggested that  
23 we bifurcate it to do punitive damages after liability and  
24 compensatory damages.

25 It struck me in thinking about the motions in limine that

1 it might actually be better to do liability, and then damages.  
2 And that might make it sort of easier to prevent the defense  
3 from being prejudiced by the admission of too much evidence  
4 that arguably relates to the emotional-distress claim, but  
5 ought not be considered by the jury as part of the liability  
6 question because of the exhaustion issue.

7 So, again, we can sort of talk about that when we get into  
8 -- more into the motions in limine. But why don't we -- get  
9 your thoughts on that but why don't we kind of go through  
10 them, one by one.

11 And I'll start with the Defendants' motions.

12 And the first one is moot basically, right?

13 There's reference to wanting to preserve the ability to  
14 put in evidence of indemnification in case the -- if the  
15 Defendant opens the door to the issue.

16 I mean, with all motions in limine, but all these rulings  
17 are subject to revisiting at trial if somebody opens the door  
18 to something.

19 In the case of indemnity, I'm not sure. If the Defendant  
20 opens the door, I think that's -- still the proper thing to do  
21 is just instruct the jury not to consider it, and it's not to  
22 -- not to put in evidence of an indemnification agreement.

23 But in any event, I think for now, at this stage, the  
24 first motion can be denied as moot. Right?

25 **MS. NYGAARD:** The only thing that we wanted was

1 during discussions with Plaintiff's counsel, they had  
2 indicated that if Defendants brought up information about the  
3 individual Defendants' financial situation, that they wanted  
4 the possibility to bring up indemnification.

5 **THE COURT:** Right. And I think that's -- I think  
6 that's actually not the right way to deal with that problem.  
7 I think the right way to deal with that problem is to instruct  
8 the jury to disregard financial condition.

9 **MS. NYGAARD:** No, Your Honor; I believe that we are  
10 entitled to ask Defendants questions about their personal  
11 financials because under the Government Code, the public  
12 entity is not authorized to pay punitive damages.

13 So --

14 **THE COURT:** I'm not talking about punitive damages  
15 now.

16 **MS. NYGAARD:** Okay.

17 **THE COURT:** I'm talking about with respect to  
18 liability and compensatory damages.

19 **MS. NYGAARD:** Oh, yes, that, we agree is moot now.

20 **MR. BENEDETTO:** We agree.

21 **THE COURT:** Okay. All right. So, Defendants' second  
22 motion in limine, this, this brings up -- this brings up an  
23 issue that is implicated I think in a couple of the motions in  
24 limine. And it's just generally Perez's history of  
25 rabble-rousing and, you know, whether that -- whether and what

1 aspects of that can be admitted.

2 And I guess my general -- I start from the presumption  
3 that because the Plaintiff did not exhaust his administrative  
4 remedies with respect to his claim that he was retaliated  
5 against for the hunger strikes and retaliated against for his  
6 prior writings, critical of CDCR, that that -- the default is  
7 that evidence of that prior activity should not be admitted.

8 You have your argument about damages. And that argument  
9 resonates with me. But that's part of why I think, to avoid  
10 sort of the unfairness that might attend for the Defendants if  
11 a lot of that stuff comes in, that we do a damages phase  
12 separately from liability. And, so, that's the default.

13 My sort of default position is that it shouldn't come in,  
14 unless there's's another good reason for it to come in. And I  
15 think that in a limited way, there is a good reason for some  
16 of it to come in, is my tentative view. I'm happy to hear  
17 both of your views on it.

18 Number one, I think both sides agree that the materials  
19 that were confiscated are part of the case. I also think  
20 that, you know, there's an issue of credibility with respect  
21 to Burris and Pimentel -- is that how you pronounce --

22 **MR. BENEDETTO:** Pimentel.

23 **THE COURT:** Pimentel, there is an issue of  
24 credibility with respect to Burris and -- I've already  
25 forgotten.

1           **MS. NYGAARD:** Pimentel.

2           **THE COURT:** Pimentel, you know, about whether they  
3 knew Perez and knew who he was, and Pimentel got this email.  
4 And, it was about Perez and his cellmate.

5           And it makes reference to the fact that they participated  
6 in the hunger strikes. And then Burris issued the RVR against  
7 Perez for some activity that he engaged in relating to the  
8 hunger strikes.

9           And I think that that -- that has to come in, I think,  
10 because it goes to their credibility when they say they didn't  
11 know who Perez was.

12           So although, generally speaking, you know, my feeling is  
13 that Perez's history of rabble-rousing should primarily be  
14 reserved for the second phase of trial if we should get there,  
15 the fact that he was involved in hunger strikes I think comes  
16 in because of the prior RVR by Burris and because of the email  
17 which needs to come in, and therefore, by definition, mention  
18 of the hunger strikes needs to come in.

19           So what's everybody's reaction to that?

20           **MR. BENEDETTO:** Your Honor, we would certainly agree  
21 that the hunger strike evidence is relevant to Defendant  
22 Burris.

23           As a larger point though, I think our position is that  
24 what happened on October 10th, 2012, did have a longer  
25 history. And that there is a risk that if that evidence is

1     circumscribed too severely, the jury will not have a full  
2     sense of why those events unfolded in the way that they did.

3             **THE COURT:**   And that's the risk that Perez took on  
4     when he didn't exhaust those claims.   And it would be unfair,  
5     I think -- basically what you are saying is:   We want the jury  
6     to know that the Defendants were motivated by the hunger  
7     strike and his other history of rabble-rousing activity,  
8     because that's what motivated the Defendant -- that's part of  
9     what motivated the Defendants.

10            But Perez didn't exhaust that claim.   And so I think it  
11     would be unfair for the jury to know that that -- and to hear  
12     argument -- you know, to allow to you make the point that the  
13     alleged retaliation was part and parcel of his history of  
14     First Amendment activity.

15            **MR. BENEDETTO:**   I think the way I would parse that is  
16     that the Defendants' awareness and possible motive with  
17     respect to the hunger strike and the other writings bleeds  
18     into the motive that may be at stake with respect to the cell  
19     search, because the -- the lawsuit, the 2005 lawsuit concerned  
20     gang validation which was itself at issue in the hunger  
21     strikes.

22            So these are not two separate things, but they converge on  
23     October 10th.   And so we think that they are relevant to that  
24     limited extent, acknowledging that the exhaustion issue is  
25     there.

1           **THE COURT:** Yeah. And I think that what you're  
2 saying is, you know, correct to a large extent. I mean, it's  
3 relevant in that large, larger sense.

4           But, Perez does not have a claim for retaliation. He  
5 doesn't have a claim in this lawsuit that the Defendants  
6 retaliated against him for his participation in the hunger  
7 strikes and for his prior critical writings.

8           And so, you use the word "parsing," this is how you parse  
9 it. I agree, it's parsing. And it's parsing it too finely.  
10 And I think it would give you an unfair advantage to bring all  
11 that stuff in at the liability phase.

12           And so I think -- you know, again, I'll hear from you on a  
13 couple of caveats that I've included. But I think it needs to  
14 be limited to, you know, it needs -- you can't get up in your  
15 opening statement and talk about Perez being this  
16 First-Amendment hero and all this stuff, you know, all this  
17 stuff that he did. You can't get up in your opening statement  
18 and talk about Perez's long history of rabble-rousing. I'm  
19 sure you wouldn't use that exact word.

20           But if we phase the trial in the way that I'm suggesting,  
21 then during the liability phase you would be limited to, you  
22 know, mention of these issues as they're necessary, you know,  
23 to establish that Burris, you know, took action against Perez,  
24 and that Pimentel took -- that Pimentel got that email which  
25 could undermine his credibility with respect to his testimony



1 that he didn't know who Perez was.

2 **MR. BENEDETTO:** (Nods head)

3 **THE COURT:** And there would be -- by the way, with  
4 respect to that email, there would be a limiting instruction  
5 about the purpose for which it can be considered.

6 So anyway, reaction to that?

7 **MS. NYGAARD:** Um, I think, you know, Defendants are  
8 pretty much in agreement with that idea.

9 The Pimentel email, we are concerned that it could be  
10 looked at as a bad act by a non-party defendant -- or  
11 non-party CDCR employee.

12 And again, also, you know, the email doesn't include  
13 Mr. Perez's first name; it doesn't include his CDCR number; it  
14 was a different cell, you know, at the point in time.

15 So, you know, we're still saying that it's not relevant  
16 for the purposes to establish that Pimentel knew who Perez  
17 was.

18 **THE COURT:** Okay. And I disagree with that. So that  
19 will be allowed in, but with, you know, an appropriate  
20 limiting instruction.

21 And I have not been through the proposed jury instructions  
22 yet, so I don't know whether you proposed an instruction about  
23 this email. But if you believe -- I mean, you know, sometimes  
24 trial lawyers say: Well, I don't want a pinpoint instruction  
25 about that because I don't want to draw too much attention to

1 it, and we'll just...

2 You know. So it's, of course, up to you. But if you want  
3 to propose a pinpoint instruction about that email, please do  
4 so by Friday of this week. And, make an effort to reach  
5 agreement with the other side on the language.

6 And if you can't reach agreement with the other side, then  
7 I want you to file something on behalf of both sides which  
8 includes competing proposed language, and brief argument with  
9 about why each side thinks their proposed language is better.

10 So, that's by Friday. And we may discuss a couple of  
11 other pinpoint instructions as we go through stuff today. And  
12 your due date for that will be Friday.

13 **MR. BENEDETTO:** One more point, if I may, about the  
14 articles, and not the hunger strikes.

15 We believe the evidence of the articles may be relevant  
16 for a couple of additional reasons. One --

17 **THE COURT:** Because they looked at his mail?

18 **MR. BENEDETTO:** Because they looked at his mail. And  
19 the jury is entitled to assess their credibility as to -- as  
20 to those statements.

21 And second, we believe it makes it more likely that  
22 Mr. Perez would have had the articles in his cell that he  
23 claims were confiscated on October 10th if, in fact, he was a  
24 prolific author.

25 And those -- again, not the basis for a separate claim,

1 but relevant to claims that are actually viable right now.

2 **THE COURT:** So on the first point, on the issue of  
3 they looked at his mail, I agree that has some degree of  
4 relevance. But I think it -- I think it's outweighed by the  
5 possible prejudice that the Defendants would suffer from  
6 turning this into a trial about Perez and his history of  
7 advocacy.

8 So, again, if we bifurcate in the way that I'm suggesting,  
9 I don't think that that's a reason to include testimony and  
10 evidence of his history of writing.

11 You know, your other point I haven't thought about. Do  
12 they -- do they -- do they deny that they confiscated writings  
13 of his critical of CDCR? I can't remember. The witnesses?

14 **MS. NYGAARD:** Defendants are saying that they  
15 confiscated all paperwork that was inside his cell on that  
16 date. Specifically, the specific articles and legal brief  
17 that he's talking about are not identified as specific things  
18 that were taken.

19 You know, Defendants could suggest that maybe Perez could  
20 testify that he had written articles without going into, you  
21 know, detail of the mail review, and how many articles he  
22 wrote, and you know, all that kind of stuff that we feel is  
23 prejudicial and not relevant at all in this case.

24 You know, there is a dispute whether he had these specific  
25 articles and legal brief taken.

1           **MR. BENEDETTO:** I think without what I call the long  
2 history, we continue to believe that there is a risk that the  
3 jury may believe that this was sort of an isolated incident.  
4 And that what happened on October 10th was, in fact, an  
5 isolated occurrence. And that's not true. And without --

6           **THE COURT:** Well, I mean, you're not going to get the  
7 long history.

8           **MR. BENEDETTO:** Right.

9           **THE COURT:** But the defense has sort of given you a  
10 little bit of --

11          **MR. BENEDETTO:** Yeah.

12          **THE COURT:** Given you a little bit of a bone.

13          **MR. BENEDETTO:** Yeah.

14          **THE COURT:** In the sense that, you know, there can be  
15 mention of the fact that he had written articles critical of  
16 CDCR. I mean, we don't need to put in the articles; we don't  
17 need to have a discussion -- you know, a long discussion about  
18 with what they -- or even really a short discussion about how  
19 -- you know, all the ways in which he criticized CDCR.

20          But it sounds like they're saying they're sort of willing  
21 to live with the idea that there can be -- he can mention that  
22 he had written articles critical of CDCR, as long as a big  
23 production isn't made of it. And that's something that I  
24 would be on top of during trial.

25          Is that right?

1           **MS. NYGAARD:** Uh-huh. That's what we were  
2 suggesting.

3           **THE COURT:** Yeah.

4           **MR. BENEDETTO:** Yeah. I mean, I think we could be  
5 amenable to that.

6           **THE COURT:** Yeah. So that will be the ruling with  
7 respect to his history of rabble-rousing.

8           Defendants' -- the Motion in Limine No. 3 about the  
9 security threat group policy for gang validations. I have a  
10 bunch of questions about this one.

11           I mean, overall, it struck me that the jury should know --  
12 should have -- get sort of a brief history of this issue of,  
13 you know, they had this policy, and then they changed to this  
14 policy, and here's some of the reasons why they -- behind the  
15 change -- changes that were made.

16           And so, I guess that sort of counsels in favor of the  
17 ruling that, you know, the policy is relevant, and the policy  
18 can be referenced or admitted. But to me, the question is how  
19 much, and how does it come in?

20           I find myself wondering whether this is the appropriate  
21 subject of expert testimony at all. It's not immediately  
22 clear to me why an expert is needed to provide sort of a brief  
23 narrative to the jury with sort of how -- how and why things  
24 changed. But I don't know how -- you know, I hadn't thought  
25 about how else it would come in.

1       So, anyway, that's sort of my general thing about -- I  
2 haven't really done a very good job of wrapping my brain  
3 around this one yet.

4       But what is your reaction to everything I just said?

5               **MR. SEALS:** Well, Defendants' concern, Your Honor, is  
6 that going into the description, it seems to me that what they  
7 would like to offer is that the hunger strike was the cause of  
8 this new STG policy going into effect. And Mr. Perez was a  
9 participant in the hunger effect. Ergo, Mr. Perez was the  
10 cause of the new policy going into effect.

11       Which, we believe the hunger strike isn't relevant to  
12 their claim, as we discussed some earlier. And that going  
13 into that would be prejudicial in that it would paint our  
14 clients as if they had some doing as to what CDCR's policy is.  
15 And that CDCR's policy change admitted that there was  
16 something wrong with the way the SHU was run, when our  
17 Defendants had no role in the policies of CDCR and how they  
18 run the SHU.

19               **THE COURT:** Okay. But, I mean, you could establish  
20 that your clients had no role in the way the SHU was run. I  
21 mean, that would be a pretty easy thing to establish through  
22 evidence.

23       And I think my concern -- putting aside the issue of  
24 expert, whether it should be expert testimony or lay testimony  
25 about this, this -- you know, this case arose because Perez

1 was supposed to be subject of a new validation procedure  
2 pursuant to the new policy. But they made a mistake, and they  
3 validated him pursuant to the old policy.

4 Right? And -- am I right about that?

5 **MR. SEALS:** Mostly. Yeah; I guess my only concern  
6 with the way you phrased it was that on October 10th, so as --  
7 as discussed during the motion for summary judgment, the  
8 higher-ups made the mistake that --

9 **THE COURT:** Right, right. Yeah.

10 **MR. SEALS:** -- a new validation should proceed. So  
11 as of October 10th, they proceeded under the correct -- they  
12 proceeded under the regs that were in place.

13 **THE COURT:** That were in place, yeah. No, I  
14 understood that that was --

15 **MR. SEALS:** Okay.

16 **THE COURT:** That understanding was built into my  
17 words. Even if I didn't say so out loud.

18 **MR. SEALS:** Okay.

19 **THE COURT:** So yeah, I get that. But nonetheless, he  
20 was supposed to get a new validation, he was supposed to be  
21 subject to a new validation procedure pursuant to a new policy  
22 that they were working on. And that was pursuant to his  
23 settlement agreement. Right?

24 And they made a mistake, and thought that the settlement  
25 agreement required a new validation procedure right away, and

1 they -- they proceeded under the regs that existed at the  
2 time.

3 Right?

4 **MS. NYGAARD:** Your Honor, the -- the settlement was  
5 being negotiated in 2012. The new regs weren't in effect  
6 while they had started the settlement negotiations.

7 The language of the settlement agreement says that  
8 Mr. Perez shall receive a new validation under existing  
9 regulations or policies. "Existing."

10 So in 2012, in October, when the higher-ups made the  
11 mistake that there was a valid settlement agreement, the  
12 existing regulations at that point in time was the Title XV.

13 **THE COURT:** Right.

14 **MS. NYGAARD:** Not the STG.

15 **THE COURT:** Right. But then by the time they finally  
16 actually reached the settlement agreement or signed the  
17 settlement agreement, the new policies were in place?

18 **MS. NYGAARD:** Correct, like, nine months later.

19 **THE COURT:** Right. And so I guess that's my whole  
20 point, is that -- I mean, for this to make any sense to the  
21 jury, doesn't the jury need to receive an explanation of all  
22 of this?

23 I mean, this goes both to this motion and also the motion  
24 that you have about not wanting to -- the jury to learn that  
25 this was a mistake. Which, by the way, I don't know why you



1 filed that motion, because I think it's very much in your  
2 interest for the jury to learn that this was a mistake.

3 But, be that as it may, I mean, how can the jury sort of  
4 assess this case without understanding -- I mean, this is --  
5 this is primary backdrop the case. This is like, sort of, how  
6 it all went down.

7 So why shouldn't the jury be able to get an explanation  
8 of -- you know, not a long, you know, ponderous explanation,  
9 but an explanation of, you know, the old policy, the new  
10 policy, why it changed, and where Perez's settlement agreement  
11 fit into all that.

12 **MR. SEALS:** Well --

13 **THE COURT:** I just don't understand how the jury is  
14 going to be able to understand what you all are talking about  
15 unless it hears that back story.

16 **MR. SEALS:** I think our position is that it's a  
17 discrete issue that on October 10th, Defendants were told to  
18 prepare a new validation packet. So they went, and part of  
19 preparing that validation packet was to do a search of Perez's  
20 cell.

21 So, it doesn't -- I don't think it needs to go into all of  
22 the STG policy changes. Basically the start was that they  
23 were told to validate Mr. Perez on October 10th.

24 **THE COURT:** Okay. But then, they are going to say to  
25 the jury, Mr. Perez is going say to the jury that: They were

1 retaliating against me for filing a lawsuit, and they said  
2 that this is what happens when you file a lawsuit, and you  
3 should file more law- -- you people should file more lawsuits  
4 because it makes our job more fun.

5 And then the jury's going to be like: What lawsuit? What  
6 are you talking about?

7 Okay, and then what are we going to let the jury know  
8 about the lawsuit?

9 **MR. SEALS:** That there was -- their supervisors had  
10 informed him that there was a settlement or a court order.

11 **THE COURT:** Uh-huh.

12 **MR. SEALS:** That led to a new validation being  
13 necessary.

14 **THE COURT:** Okay. But, of course, that ended up  
15 being incorrect. Right?

16 **MR. SEALS:** Right. But at that -- the fact that it  
17 was incorrect -- Defendants didn't know that it was incorrect.  
18 Defendants went on the advice of their supervisors.

19 **THE COURT:** Well -- right. But, but why was there a  
20 court order to do a new validation?

21 **MR. SEALS:** There wasn't.

22 **THE COURT:** There wasn't. Oh, there wasn't. Well,  
23 then, why are we telling the jury that there was?

24 **MR. SEALS:** Well, we're telling them that the  
25 Defendants' supervisors told them --

1           **THE COURT:** Why did the Defendants' supervisors tell  
2 them that there was a court order?

3           **MR. SEALS:** Because they made a mistake.

4           **THE COURT:** Okay. But the jury should just be left  
5 under the misimpression that there actually was a court order  
6 requiring them to do this?

7           **MR. SEALS:** I guess -- we have -- we've tried to  
8 figure out how to best address this issue.

9           **THE COURT:** Yeah. And I think the best way to  
10 address the issue is to tell the jury the story about what  
11 went down.

12           **MR. SEALS:** And I guess our concern with that is, as  
13 you mentioned earlier, the discussion of Mr. Perez's  
14 rabble-rousing. And I guess that being tied in with all of  
15 the inmates' rabble-rousing, that got the policy to change.  
16 And how much testimony is going to be permitted regarding the  
17 conditions of the SHU and how terrible the conditions of the  
18 SHU were before.

19           And all of this stuff, you know: The SHU was so horrible,  
20 it was so terrible that the CDCR had to change the policy.

21           **THE COURT:** But as you said, like, your clients  
22 weren't responsible for any of that. Right?

23           **MR. SEALS:** Right.

24           **THE COURT:** And we can -- you know, we can -- you can  
25 establish that, I mean, at trial, that, you know, your clients

1 didn't have any policy-making authority with respect to how  
2 things are run in the SHU.

3 But to give context to this dispute, I just don't see how  
4 -- I don't see, you know, at what place it makes sense to --  
5 you know, wherever you cut it off, you know, it doesn't make a  
6 lot of sense.

7 Like, we just started going down that road, right? You  
8 know, are we going to leave the jury with the misimpression  
9 that it was a valid court -- there was a valid court order  
10 that required a validation to take place on October 10th?  
11 That doesn't really make sense.

12 Are we going to leave the jury with the misimpression or  
13 the impression that these Defendants were -- is the jury not  
14 going to know what the lawsuit was about?

15 **MR. SEALS:** Prior lawsuit?

16 **THE COURT:** Yeah.

17 **MR. SEALS:** I think -- no, they'll know, because  
18 that's why he needed a new validation.

19 **THE COURT:** That's why you needed a new validation.

20 **MR. SEALS:** Right.

21 **THE COURT:** Because of the new lawsuit.

22 **MR. SEALS:** Because the lawsuit was regarding val- --  
23 his -- his placement in the SHU.

24 **THE COURT:** Okay.

25 **MR. BENEDETTO:** Your Honor, if I may, to sort of

1 bring the two together, when the Defendants characterize the  
2 settlement negotiations, sort of the main point that they're  
3 omitting is that the central feature of the settlement was  
4 that Mr. Perez would be validated under the new guidelines  
5 that were being implemented, which he knew were being  
6 implemented, because of his involvement in the hunger strikes.  
7 And that he had received draft copies of the SEG memo. And he  
8 knew that he lacked the disciplinary infraction, and that he  
9 would be let out from the SHU.

10 That is crucial to this story. And it is why, certainly,  
11 I think, we believe the mistake is relevant. But it also ties  
12 into the -- to the memo, because without that sort of crucial  
13 fact of the memo changing the criteria for SHU housing, the  
14 story doesn't make any sense.

15 **THE COURT:** Okay. Well, why can't you -- going to  
16 the issue of whether this is an appropriate subject of expert  
17 testimony, why can't you elicit that information through  
18 examination of Mr. Perez and cross-examination of the  
19 Defendants, or maybe some other witness from CDCR who was sort  
20 of involved in presiding over the transition?

21 **MS. MORAN:** Yeah, I think Mr. Perez can speak to the  
22 memo. And I also think that Mr. Subia can speak to it as a  
23 percipient witness as well. He was involved in the working  
24 group that created the policy. He spoke to the hunger  
25 strikers during the creation of the policy.

1 And I think that he is able to provide guidance to the  
2 jury or allow the jury to understand what the terms of the  
3 memo meant, what the changes -- why the changes were brought  
4 about.

5 **THE COURT:** But he wasn't around when the memo was  
6 finalized, right? I mean, he was involved in discussions  
7 about how to change CDCR's policy, but he wasn't around when  
8 that memo was issued. Right?

9 So why -- he doesn't have any sort of -- I mean, what he  
10 can say as a percipient witness about that actual memo seems  
11 kind of limited.

12 **MS. MORAN:** Well, I think, as a percipient witness,  
13 he can speak to the fact that central to the whole point of  
14 the memo was that a behavior component was to be added. And  
15 that was something that was discussed at CDCR while he was the  
16 director, and while he was involved in these discussions.

17 And then separately, I think, as an expert, he would have  
18 expertise as to what type of training would be provided to  
19 Defendants to show that Defendants knew that this change was  
20 coming. And I think that that speaks to the motive of Gates  
21 in bringing the RVR. And --

22 **THE COURT:** When did he leave CDCR?

23 **MS. MORAN:** Yeah, it's March.

24 **THE COURT:** Of?

25 **MS. MORAN:** Of 2012.

1           **THE COURT:** Of 2012? And this happened in October of  
2 2012?

3           **MS. MORAN:** Right.

4           **THE COURT:** Well, I don't -- I think anything that he  
5 would have to say about the training they received on the new  
6 policy would be speculation, then.

7           **MS. MORAN:** Well, I think it would be in the -- as a  
8 capacity as an expert. As to someone who knows how the CDCR  
9 operates when rolling out a new policy, any new policy. And  
10 what type of training is provided the line officers and the  
11 IGIs.

12           **THE COURT:** So, okay. So, so, maybe this would be a  
13 good time to sort of take a step back and tell me what it is  
14 that you want -- Subia? Is that his name?

15           **MS. MORAN:** Uh-huh.

16           **THE COURT:** What is it that you want him to provide  
17 expert testimony on? Can you kind of give me a summary of it?

18           **MS. MORAN:** Sure. I think we would want him to  
19 provide expert testimony with respect to a number of topics.

20           With respect to the STG pilot program, I think we would  
21 want him to testify that it came about as a result of the  
22 hunger strikes, and that one of the concerns of the hunger  
23 strikers was that people were being placed indefinitely in the  
24 SHU without there being any sort of corresponding behavioral  
25 component.

1 And that in order to address that concern, that the CDCR  
2 took about to kind of change the policy so that it would be  
3 centered around a behavioral component, or SHU placement would  
4 be centered around behavioral components.

5 We would also like him to testify as to CDCR policy with  
6 respect to cell searches. And, you know, in the ordinary  
7 course of searching an inmate's cell, what is the general  
8 practice and procedure with respect to how belongings are  
9 kept.

10 **THE COURT:** All right. Anything else?

11 **MS. MORAN:** And then I think we would like him to  
12 testify that when CDCR rolls out a policy, particularly one of  
13 this magnitude, there is extensive training. And that prison  
14 officials and IGIs would have been extensively trained on the  
15 parameters of this program.

16 **THE COURT:** But when was the policy rolled out?

17 **MS. MORAN:** In October, 2012, it was, like,  
18 published.

19 **THE COURT:** In October, 2012, it was published?

20 **MS. MORAN:** Yeah, the memo.

21 **THE COURT:** But I thought that the -- I thought that  
22 we all agreed that the Defendants did the validation pursuant  
23 to existing regs.

24 **MR. SEALS:** If I may, Your Honor, that's one of our  
25 main concerns with Subia as an expert is that he got that



1 wrong in his expert report, and admitted that during thing  
2 testimony, that he didn't understand the difference between  
3 phase one and phase two. And when the regs were actually  
4 going into place.

5 So the change in the validation procedures did not go into  
6 place until 2013, late 2013.

7 **THE COURT:** Late 2013?

8 **MS. NYGAARD:** March.

9 **MR. SEALS:** March, sorry.

10 **MS. MORAN:** A fact that he testified at, at the  
11 deposition. He amended the statement in his expert report.  
12 Like, I don't think that the jury would be confused as to that  
13 fact at all.

14 **MR. SEALS:** But it goes to his expertise and  
15 whether -- if he only prepared that in preparation for this  
16 trial, that's not expertise that he doesn't have.

17 **MR. BENEDETTO:** At most, it would go -- at most, it  
18 might go to the weight that the jury would give to the -- to  
19 his credibility. But it doesn't vitiate him as an expert.

20 **THE COURT:** But what did he say at his deposition  
21 about when you would normally expect people to get trained on  
22 a policy that doesn't go in effect until March, 2013?

23 **MR. BENEDETTO:** I don't believe he was specifically  
24 asked that question.

25 To be fair, in October of 2012, it was clear in the memo

1 that the behavior component was being implemented over the  
2 next few months. The fact is that is as of validation packets  
3 received before March --

4 **THE COURT:** But, so what? I mean, on the issue of  
5 whether we would expect them to have been trained by October,  
6 2012, so, so what, if the memo said, you know, there's going  
7 to be a behavioral component of this that's going to be  
8 implemented in a few months?

9 **MS. MORAN:** Well, I think it goes to the motive in  
10 delivering that RVR. If Gates had been fully trained and knew  
11 that he couldn't keep Jesse in the SHU without an RVR, and he  
12 had gone through extensive training to let him know that  
13 that's the case, I think that that's very probative of his  
14 retaliation.

15 **THE COURT:** But how do we know that -- was it Burris?  
16 Sorry.

17 **MS. MORAN:** Gates.

18 **THE COURT:** How do we know that Gates would be  
19 expected to have been trained by that point?

20 **MS. MORAN:** Well, I think that's where Subia's expert  
21 testimony comes in. That even though the program was rolled  
22 out or fully implemented by March, 2013, by October 12, there  
23 was an official publication of the memo that was widely  
24 distributed.

25 And as Subia I think will testify, in that instance where

1 there's a memo that is rolling out a policy, training would  
2 have occurred, you know, months before.

3 **THE COURT:** So, but you don't need his expert  
4 testimony to establish that the memo was circulated by  
5 October, 2012. Right?

6 **MS. MORAN:** No.

7 **THE COURT:** And distributed widely by October 2012?  
8 You don't need Subia for that, do you?

9 **MS. MORAN:** No.

10 **THE COURT:** You just want him for -- and does the  
11 memo -- forgive me, I have not read the memo, so that might be  
12 -- you know, this is one I'm going to need to spend a little  
13 more time on before ruling, I think.

14 But, does the memo talk about why the changes are being  
15 made?

16 **MS. MORAN:** Tying it to the hunger strike? It does  
17 not. What the memo does is they tie it to studies coming out  
18 of UCLA as to revamping security threat groups.

19 **THE COURT:** But it sort of explains what the old  
20 policy is and what the new policy is going to be?

21 **MS. MORAN:** Yeah --

22 **THE COURT:** Why --

23 **MS. MORAN:** It explains the new policy in a fair  
24 amount of detail.

25 **THE COURT:** And why the changes are being made?

1           **MS. NYGAARD:** It has, like, two pages that explain  
2 the purpose of the new program.

3           **THE COURT:** Uh-huh. So, again, what I'm trying to do  
4 here is sort of, you know, sift through this and try to figure  
5 out what expert testimony is really needed for.

6           And so one of the things that you say expert testimony is  
7 needed for is to say that: We would expect that by time a  
8 memo like this is circulated, the prison guards would have  
9 already been trained on this.

10          Is that basically --

11           **MS. MORAN:** (Nods head)

12           **THE COURT:** And what's the basis for his testimony  
13 about that?

14           **MS. MORAN:** With respect to the training?

15           **THE COURT:** Yeah.

16           **MS. MORAN:** I think just his experience as the Deputy  
17 Director of the Division of Adult Operations. And overseeing,  
18 you know, large programs being rolled out in the past.

19           **THE COURT:** But I mean, is there some -- I mean,  
20 every program is different, and different people might be  
21 trained in different ways and at different times, depending on  
22 what the program rollout is. Right?

23           **MS. MORAN:** Right. But Mr. Subia has experience with  
24 institutional gang investigators, which is who Defendants are.  
25 And the type of training that IGIs receive. And I think he

1 would assist the jury with his opinion in terms of: This is  
2 the type of program that would have been the subject of  
3 extensive training by institutional gang investigators.

4 **MR. SEALS:** However, his experience as an IGI was in  
5 the nineties, I believe. And not at Pelican Bay.

6 **MS. MORAN:** No, not as an IGI; I'm saying with an  
7 IGI. Because he, as -- as the director, you know, he oversaw  
8 the rollout of several programs.

9 **THE COURT:** Okay, so --

10 **MR. BENEDETTO:** He was also a warden. And I think  
11 that to the extent that wardens would be sort of  
12 institutionally responsible for the implementation of training  
13 in their facilities, he could speak in that regard as well.

14 **THE COURT:** You may be right, that it goes to weight  
15 and not admissibility. But I'm not convinced that this is the  
16 appropriate subject of expert testimony.

17 I'm not convinced that, you know, to make the points that  
18 you want to make and that I think you should have the right to  
19 make, you need an expert witness.

20 I mean, I haven't given careful thought to how you would  
21 get it all in through lay witnesses, but -- you know, again,  
22 part of it can certainly be through Perez. And, you know,  
23 part of it I assume could be through -- you know, examination  
24 or cross-examination of other -- other lay witnesses.

25 **MS. NYGAARD:** And Your Honor, Defendants anticipate

1 calling Susan Hubbard as a witness. And she was instrumental  
2 in drafting this policy, the STG program, and getting  
3 implemented, and she's still working as a part of it.

4 So we --

5 **THE COURT:** Were you planning to call her as an  
6 expert witness or percipient?

7 **MS. NYGAARD:** No, she is not being designated as an  
8 expert, just a percipient witness. So we would object to  
9 Mr. Subia being an expert on this issue because, you know,  
10 it's pure speculation. He wasn't there after March 30th. He  
11 wasn't at CDCR to talk about the specific details of who got  
12 trained and when, et cetera.

13 So, we believe that it would be more appropriate for them  
14 to question Ms. Hubbard about that.

15 **MR. BENEDETTO:** We will be happy to cross-examine  
16 Ms. Hubbard on this. But, Ms. Hubbard's ability to talk about  
17 operationally, right, the training that would be attendant to  
18 this, and also to enable the jury to evaluate the credibility  
19 of the Defendants when we anticipate them saying they don't  
20 remember any training about this particular program, if that's  
21 a credible statement.

22 And while we think Ms. Hubbard's testimony may be helpful  
23 for the jury, --

24 **THE COURT:** But it -- sorry.

25 **MR. BENEDETTO:** -- that the testimony of someone like

1 Subia who had operational experience would come in handy.

2 **THE COURT:** Uh-huh.

3 **MS. NYGAARD:** Ms. Hubbard also has operational  
4 experience within CDCR. I believe that she assumed the  
5 position -- I don't know exactly; I don't have her resume in  
6 front of me. But sometime after Subia left, Susan Hubbard  
7 took his position. So she has operational experience within  
8 CDCR also.

9 **THE COURT:** Would the memo, the memo, itself, would  
10 it be admissible? I know you've moved to exclude it as  
11 prejudicial or whatever, and I'm inclined to disagree with you  
12 about that.

13 But would it be otherwise admissible, like over a hearsay  
14 objection or something like that?

15 **MS. NYGAARD:** We don't have a problem with having a  
16 specific portion of the policy admitted into evidence  
17 regarding the -- you know, the RVRs and the disciplinary or  
18 the gang nexus requirement. We just feel that 125 pages of  
19 this policy is just -- would be confusing to the jury and a  
20 waste of their time, et cetera.

21 We don't have an objection to the relevant portion being  
22 admitted. We just think the entire thing is just too much,  
23 would confuse the jury, waste of time, mislead them,  
24 et cetera.

25 **THE COURT:** My tentative inclination here is to say

1 that we should admit the relevant portions of the memo. We  
2 should -- you know, both parties should be allowed to elicit  
3 testimony about how the old policy worked, how the new policy  
4 worked, why the changes were implemented.

5 But I'm -- I just really question whether, you know, it's  
6 an appropriate subject of expert testimony. I'm not sure it's  
7 so, you know, inaccessible as to -- you know, for jurors, as  
8 to be -- as to require expert testimony.

9 But I'm going to give that one some more thought.

10 **MR. SEALS:** Can I make one last comment?

11 **THE COURT:** Sure.

12 **MR. SEALS:** Just that they repeatedly referred to  
13 Subia's experience implementing policies as the high-up in  
14 CDCR. But this is one of the largest policy changes that  
15 CDCR's implemented in a long time. So it would be very  
16 different from other policies that were implemented during  
17 Subia's time.

18 **THE COURT:** Uh-huh.

19 **MS. MORAN:** One more point as to the size of the  
20 policy, and kind of what portions are relevant or not.

21 **THE COURT:** The size of the memo, you mean?

22 **MS. MORAN:** Yeah. I think that the fact that this  
23 policy was a vast change in validation procedure and that  
24 Perez's 2005 lawsuit, the subject of it was his validation  
25 procedure, that the jury's entitled to know kind of that



1 that's what the policy entailed, because I think it's very  
2 probative that right on the eve of this policy, in conjunction  
3 with his lawsuit, he was subject to retaliation.

4 **THE COURT:** I mean, I sort of generally agree with  
5 you. And I think you can probably do that through the memo,  
6 or the relevant portions of the memo, and examination and  
7 cross-examination of lay witnesses.

8 **MS. MORAN:** (Nods head)

9 **THE COURT:** But I will think about that more.

10 My very strong inclination is to grant Motion in Limine  
11 No. 4. And, to grant the Plaintiff's motion in limine about  
12 prior rules violations by Mr. Perez.

13 **MR. BENEDETTO:** Plaintiff -- right.

14 **THE COURT:** You guys moved to exclude --

15 **MR. BENEDETTO:** Right, yes.

16 **THE COURT:** -- evidence of prior rules violations by  
17 Mr. Perez. They moved to exclude evidence of grievances by  
18 other prisoners against the Defendants.

19 My strong inclination is to grant both of those motions,  
20 because they would be mini trials on peripheral issues, and it  
21 wouldn't be -- your point is well taken with respect to  
22 Mr. Perez that this is not an excessive-force case. And so  
23 whether he misbehaved in some, you know, context is not really  
24 relevant to his First Amendment retaliation claim, or  
25 marginally relevant.

1           **MR. BENEDETTO:** The only comment that Plaintiff would  
2 make is that with respect to the staff complaints filed  
3 against the Defendants, Plaintiff would not seek to introduce  
4 that evidence to show that they actually committed the acts  
5 that are alleged. But rather, and only, that they received  
6 those grievances, the nature of the grievance. And that the  
7 jury could infer from that fact that they may have an  
8 inclination to dislike prisoners who file --

9           **THE COURT:** I understand --

10          **MR. BENEDETTO:** -- less than meritorious grievances.

11          **THE COURT:** I understand the argument, yeah. But I'm  
12 not going to allow those in.

13          The only exception, of course, is the -- I think, although  
14 you moved to exclude all of them, all of the RVRs issued  
15 against Mr. Perez, I think you actually want one of them in,  
16 right? And I've said that one of them is relevant. Because  
17 it's relevant to Burris and whether he knew Perez.

18          **MS. NYGAARD:** And Your Honor, I don't even think that  
19 was a rules violation report. It was a chrono.

20          **MR. BENEDETTO:** Right.

21          **THE COURT:** And I don't think the document -- there's  
22 no reason that the document needs to be admitted into  
23 evidence. But, it's fair game to talk about that.

24          **MR. BENEDETTO:** Right. Yeah, we certainly weren't  
25 intending to exclude testimony about that particular document,

1 but we separated that as a chrono from an actual CDC 115.

2 **THE COURT:** Okay, got it. Okay.

3 **MS. MORAN:** And then, one question of clarification  
4 with respect to Motion in Limine No. 4.

5 In granting, would Defendants -- or would Plaintiff still  
6 be allowed to refer to the SEG policy and memo with respect to  
7 its validation procedures? That it was a change in validation  
8 procedures? Since the motion, itself, is --

9 **THE COURT:** Wait, are you talking -- going back --

10 **MS. MORAN:** I'm sorry, 3, yeah.

11 **THE COURT:** Sorry, start over. I was distracted,  
12 because I was thinking about 4.

13 **MS. MORAN:** Sorry about that.

14 So with respect to Motion in Limine No. 3, the Defendants  
15 moved to exclude everything regarding the policy except for  
16 the disciplinary behavior needed for SHU placement.

17 So, my question is: Would Plaintiff be precluded from  
18 providing testimony or evidence that the STG policy was,  
19 itself, a change in validation procedure?

20 **THE COURT:** I'm not sure I understand the difference  
21 between those two things.

22 **MS. MORAN:** So, I think of the validation procedure  
23 as being separate from SHU placement.

24 **THE COURT:** Okay.

25 **MS. MORAN:** That under the old policies, one could be

1 validated as a prison gang associate, and automatically placed  
2 in SHU housing.

3 **THE COURT:** Uh-huh.

4 **MS. MORAN:** And the change was that there's  
5 procedures with respect to validation. And without a  
6 behavioral component, one could still be validated, but not  
7 placed in SHU housing.

8 **THE COURT:** I mean, what you just said seems to me  
9 like an appropriate thing to be able to establish in front of  
10 the jury.

11 **MS. MORAN:** Okay. Thank you.

12 **THE COURT:** All right. Going to No. 5, we already  
13 talked about the email from Ellery, and why that is  
14 admissible. This is Defendants' Motion in Limine No. 5. Why  
15 that can be used.

16 Except, you know, again, it may be appropriate to have a  
17 limiting instruction. Any limiting instruction that you want  
18 to propose, either jointly or competing limiting instructions,  
19 as I said, are due by Friday.

20 And then we've kind of already talked about this, but the  
21 other issue that's kind of still live in the Defendants' fifth  
22 motion in limine is this question of whether the jury should  
23 be able to hear the story of -- you know, of how the bosses  
24 thought there was a settlement that required a new gang  
25 validation.

1 And I think that the jury should be able to hear the story  
2 about what happened. Because I think it would be just too  
3 difficult to truncate it.

4 **MR. SEALS:** Can we prepare or can we draft a limiting  
5 instruction that would sort of --

6 **THE COURT:** Absolutely.

7 **MR. SEALS:** Hopefully keep that a little bit tighter,  
8 then.

9 **THE COURT:** Absolutely. Yeah.

10 **MR. SEALS:** Okay.

11 **THE COURT:** I think with respect to the -- I'm going,  
12 moving on to Perez's Motion in Limine No. 1, and No. 2, which  
13 are the convictions and street-gang involvement of Mr. Perez  
14 and of his two witnesses, Mr. Guerrero and Mr. Mendoza.

15 And my reaction to that is the rule calls for the jury to  
16 learn that he was -- he and they were convicted of felonies,  
17 and the jury can learn that they were convicted of felonies.  
18 And it seems rather obvious that they were convicted of  
19 felonies, in any event.

20 And so the jury can learn of that, and the government can  
21 cross-examine Mr. Perez and those other witnesses about the  
22 fact that they were convicted of felonies. But I don't see  
23 any reason to go beyond that to get into the details of it.

24 So, unless -- again, as with all these rulings, it's  
25 subject to change at trial if somebody opens the door. But,

1 you know, it will be limited to the fact that they are in  
2 there for having committed felonies or a felony, whichever the  
3 case may be, with respect to each witness.

4 With respect to the prior gang involvement, I think that  
5 that -- I think that because so much -- because this case is  
6 so much about gang validation and, you know, this guy Perez  
7 had a lawsuit about whether he was properly validated, and --  
8 I think to get into -- I understand that prior gang activity  
9 before they came to prison is relevant. And it's relevant to  
10 -- it goes to their bias, I get that.

11 But I think under 403, given the particular very unique  
12 facts of this case, to have to get into whether the witnesses  
13 were -- had gang involvement before they came to prison or  
14 whether they were members of a prison gang is too -- it would  
15 be too prejudicial, and would -- I mean, because whether they  
16 were members of a gang or not either before they were in  
17 prison or now is not relevant to whether the Defendants  
18 violated Mr. Perez's First-Amendment rights by retaliating  
19 against him.

20 And like I say, it is relevant to bias, but because so  
21 much of this is wrapped up in the idea of gang validation and  
22 whether Mr. Perez was a gang member, on an atmospheric level,  
23 anyway, I think it's too prejudicial. And so I'm going to  
24 exclude it.

25 **MS. NYGAARD:** Okay.

1           **MR. SEALS:** Your Honor?

2           **THE COURT:** Yeah.

3           **MR. SEALS:** Depending on how much they get into  
4 Mr. Perez's prior lawsuit regarding his validation and -- I  
5 know that they claim that he won that lawsuit which led to the  
6 new -- the new validation procedure, you know. Our position  
7 is that a settlement is not necessarily a victory, and that  
8 these policies were coming.

9           And so if they get into all this stuff showing that CDCR  
10 messed up and validated him but he wasn't a gang member, you  
11 know, going on and on about how he's not actually a gang  
12 member, I think that this -- this would sort of be a  
13 counterbalance to that testimony.

14           **THE COURT:** I think that's a good example of how, you  
15 know, the door could be opened. And I think, you know, it is  
16 appropriate to establish that he filed a lawsuit. And it's  
17 appropriate to establish -- to kind of -- for the jury to know  
18 what the lawsuit was about. And it's appropriate for the jury  
19 to know that the lawsuit was settled.

20           And implicit in all that is that he contended he shouldn't  
21 have been validated, right? And I think it's fine for the  
22 jury to learn that he contended he shouldn't have been  
23 validated.

24           But, if, if Mr. Perez or his lawyers place undue focus on,  
25 you know, the actual merits of the underlying lawsuit, and try

1 to convey to the jury in anything more than a passing way as  
2 part of an effort to describe the lawsuit, the prior lawsuit  
3 to put this case into context, then I would consider that  
4 opening the door to whether -- to evidence that Mr. Perez did,  
5 in fact, have prior gang involvement.

6 Does that make sense?

7 **MR. BENEDETTO:** We agree with that.

8 **MS. NYGAARD:** Yes.

9 **THE COURT:** Okay. And same with Guerrero and  
10 Mendoza, same principle.

11 I think that's it on motions in limine, right?

12 **MS. NYGAARD:** Right.

13 **MR. BENEDETTO:** Right.

14 **THE COURT:** Okay. So I'll issue a short written  
15 ruling on those, after I think a little bit more about the  
16 expert, you know, the expert testimony issue, so that you all  
17 will have a written ruling which hopefully summarizes this in  
18 a somewhat comprehensible way and provides -- gets everybody  
19 on the same page.

20 Now that we have been here for a while, does anybody have  
21 any thoughts about my bifurcation proposal?

22 **MS. NYGAARD:** Defendants like that idea. We'd be in  
23 agreement with it.

24 (Off-the-Record discussion between counsel)

25 **MR. BENEDETTO:** Your Honor?



1           **THE COURT:** Yeah.

2           **MR. BENEDETTO:** This is a tough issue. I'm going to  
3 front that.

4           Our -- our position is that the issue of motive, the  
5 statements that Plaintiff alleges were made to him by the  
6 Defendants "We're going keep you here, this is what happens  
7 when people file lawsuits" is so tied to the harm that we're  
8 seeking that to separate the two questions would sort of  
9 prejudice us in a way as to liability that we think would not  
10 be appropriate.

11           In our view of the world, the harm is -- is very  
12 intertwined with the motive. And to sort of establish a kind  
13 of artificial separation between the two we think would  
14 severely and unduly prejudice us.

15           **THE COURT:** But -- I mean, I do understand what  
16 you're saying. But the jury is going to be instructed that --  
17 I mean, and I haven't gone through your jury instructions yet,  
18 and we will do jury instructions during trial.

19           And just while we're on the topic, the way it will work is  
20 I will go through your proposed -- joint proposed jury  
21 instructions, including what you all submit on Friday, and I  
22 will either tell you that you didn't do a good enough job and  
23 require you to resubmit joint proposed jury instructions -- I  
24 doubt that will happen in this case. You people seem like you  
25 have it together.

1       So what will likely happen is that I will create a set of  
2       proposed, you know, final Judge's proposed jury instructions,  
3       and submit those to you all some time in the middle of trial.  
4       And then we will have a conference at which we can discuss any  
5       objections that anybody has to the proposed final jury  
6       instructions.

7       But I assume that the instructions will essentially say  
8       that: If, in fact, they did what Perez said they did, you  
9       must find that they violated Perez's First Amendment rights.

10      Right?

11               **MR. BENEDETTO:** Right.

12               **THE COURT:** And don't you agree with that?

13               **MS. NYGAARD:** Yes.

14               **THE COURT:** And so if that's the case, then it seems  
15       like the jury is being instructed pretty clearly that  
16       regardless of what it might want to speculate about the effect  
17       of this on Mr. Perez subjectively, it was a First Amendment  
18       violation. They're effectively required to find a First  
19       Amendment violation.

20       So, thinking about it in that way, how is it that  
21       Mr. Perez would be prejudiced?

22               **MR. BENEDETTO:** Well, I think that one of the key  
23       elements is chilling effect. Chilling effect is an -- about  
24       an effect on a reasonable prisoner. And that's the element we  
25       have to prove.

1           **THE COURT:** But part of what you argued so well in  
2 the summary-judgment stage was that it's -- it's really an  
3 objective test, right? It's about whether it would chill a  
4 person of ordinary firmness.

5           **MR. BENEDETTO:** Correct.

6           **THE COURT:** And I think actually, if the test were  
7 whether it had a chilling effect on Mr. Perez, you would  
8 probably be in much worse shape in this case than you are now,  
9 right?

10          **MR. BENEDETTO:** Right. No, we would -- I mean, have  
11 asserted in our instructions, in fact, that it's an objective  
12 standard.

13          **THE COURT:** Right. And, and, to the extent that they  
14 want to try to argue that there's no First Amendment violation  
15 because he wasn't chilled because he's continued to be a  
16 rabble-rouser, I'm not even sure that would be permissible  
17 argument. I would think they would be precluded from arguing  
18 something along those lines.

19          Right?

20          **MR. BENEDETTO:** Right. Right. I mean, I think, even  
21 though -- even an objective prisoner in the SHU, however,  
22 right -- some of this still has to enter into what that  
23 analysis would be. Even if -- even if we do not assert that,  
24 Mr. Perez would need to establish actual, actual harm.

25          **THE COURT:** Uh-huh. Okay. I'll think about it a

1 little bit further. But my inclination would still be to  
2 bifurcate the way I have proposed.

3 **MR. SEALS:** Your Honor?

4 **THE COURT:** Yeah.

5 **MR. SEALS:** Just to clarify, he mentioned the  
6 threats, the threats by Defendants, and that that's necessary  
7 for the motive. And I don't think that's in dispute.

8 I think what you were stating earlier was that the hunger  
9 strike and a lot of the sort of extraneous topics are what  
10 would be bifurcated, because those go -- those may go to  
11 damages, but they don't really go to motive.

12 **THE COURT:** In other words, the big dog and pony  
13 show -- and I don't mean that in a derogatory way at all --  
14 the dog and pony show about Mr. Perez being a First Amendment  
15 crusader comes in the second phase, not the first. And what  
16 comes in in the first phase is -- is just enough to give the  
17 jury the context.

18 **MR. SEALS:** The elements.

19 **MS. NYGAARD:** The five elements under *Rhodes*.

20 **MR. BENEDETTO:** But Mr. Perez's testimony about his  
21 -- the conditions of his experience in the SHU, which we say  
22 is relevant to damage, would also be relevant to threat. And,  
23 and so, is that in the Court --

24 **THE COURT:** You mean, you mean that --

25 **MR. BENEDETTO:** In other words, if one of the -- if

1 one of the principle benefits of the bargain of his settlement  
2 was that he would have been released pursuant to the new  
3 guidelines --

4 **THE COURT:** Uh-huh.

5 **MR. BENEDETTO:** -- and he finds himself with a  
6 Defendant threatening to keep him in the SHU where he belongs.

7 **THE COURT:** Uh-huh, and you want him to be able to  
8 testify how terrible -- how big a difference it is to be in  
9 the SHU versus in the general population?

10 **MR. BENEDETTO:** Absolutely.

11 **THE COURT:** I mean, that's a different que- -- I  
12 mean, I think this is the point you were just making, right,  
13 is that's -- I don't see why Mr. Perez shouldn't be allowed to  
14 testify about that during the first phase, because it's not  
15 about his, sort of, prior history of rabble-rousing.

16 **MR. BENEDETTO:** Uh-huh.

17 **THE COURT:** And it's not about the emotional distress  
18 he suffered. It's about -- you know, it's to help explain to  
19 the jury why an ordinary prisoner would be chilled by the  
20 difference between being in the SHU and being in the general  
21 population. I think that should be fair game during the first  
22 phase.

23 **MR. BENEDETTO:** That's certainly our position.

24 **THE COURT:** Yeah.

25 **MR. SEALS:** You lost me a little bit.

1           **MS. NYGAARD:** Yeah. When you said that should be  
2 fair game (Indicating quotation marks), could you clarify?

3           **THE COURT:** Yeah. "They threatened to keep me in the  
4 SHU."

5           **MS. NYGAARD:** The threatening statements should be  
6 fair game during the non-damages portion of the trial.

7           **THE COURT:** Yeah. And the significance of that  
8 threat.

9           **MS. NYGAARD:** Correct.

10          **THE COURT:** Yeah.

11          **MR. SEALS:** But our concern is, I guess, how much  
12 testimony would be allowed regarding the conditions of the  
13 SHU?

14          **THE COURT:** Enough to give the jury a sense of the  
15 significance of the threat.

16          **MR. SEALS:** I guess I'm -- I'm trying to figure out  
17 how that -- how the conditions of the SHU fit into the issue  
18 of whether or not Defendants retaliated against Plaintiff.  
19 Because the threat, while the threat I believe is relevant --

20          **THE COURT:** Well, there has to be First Amendment  
21 injury, right? And the threat has to chill a person of  
22 ordinary firmness. Right?

23          **MR. SEALS:** The threat -- the threat is not one of  
24 the alleged adverse actions. So that's not --

25          **MR. BENEDETTO:** Yes, it is.

1           **THE COURT:** Well, wait a minute. Part of the case is  
2 that they issued a -- an allegedly false RVR against him --

3           **MR. SEALS:** Correct.

4           **THE COURT:** -- to keep him in the SHU.

5           **MS. NYGAARD:** Right. That part is --

6           **MR. SEALS:** Correct. The confiscation of his  
7 materials, the alleged trashing of his cell --

8           **THE COURT:** Yeah.

9           **MR. SEALS:** -- and the issuance of the RVR.

10          **MR. BENEDETTO:** And Your Honor, there are also  
11 statements that Mr. Perez will testify were made to him in the  
12 course of the cell search from Defendant Gates, who later  
13 issued the RVR. That -- that would amount to a threat to  
14 person of ordinary firmness.

15          **THE COURT:** Yeah. I mean, I have primarily viewed  
16 those statements as evidence of retaliation as opposed to, you  
17 know, retaliatory action, in and of themselves.

18          **MR. BENEDETTO:** Right. We do believe that there is  
19 circuit law to support our position that a threat can stand  
20 alone as an adverse action. But we also believe it's evidence  
21 of motive.

22          **THE COURT:** Yeah. But, I mean, why is that -- isn't  
23 that really like, to a certain degree, neither here nor there?  
24 Because so much of your case is built on the idea that this  
25 false rules violation report was issued to keep him in the

1 SHU.

2 **MR. BENEDETTO:** (Nods head)

3 **THE COURT:** And so, why wouldn't it be relevant to --  
4 why wouldn't Mr. Perez be allowed to explain what a big deal  
5 it is to be kept in the SHU?

6 **MR. SEALS:** All right.

7 **MS. NYGAARD:** I understand what you're saying,  
8 Your Honor.

9 **THE COURT:** Okay. All right. So, let's see.  
10 Anything else on the motions in limine?

11 **MR. BENEDETTO:** No, Your Honor.

12 **MS. NYGAARD:** (Shakes head)

13 **THE COURT:** Okay. And we have discussed bifurcation.  
14 I'm pretty -- I'll think about it a little more, but I'm very  
15 strongly leaning towards bifurcating it in the way that we  
16 have discussed.

17 On the Defendants' Motion in Limine No. 4, which is to  
18 exclude evidence of grievances filed against the Defendants by  
19 other prisoners, you had a motion to seal in there. And it  
20 really didn't sort of meet the standard for -- that would  
21 justify sealing materials. I mean, I think you have to show  
22 that, you know, there's a pretty compelling need to seal the  
23 materials.

24 So, do you want to like take a shot at making that showing  
25 now, so I can hopefully grant your motion to seal?



1 I mean, why is that stuff, why should that be -- why  
2 should that stuff be concealed from the public eye?

3 **MS. NYGAARD:** Could you give us one moment?

4 **THE COURT:** Sure.

5 (Off-the-Record discussion between counsel)

6 **MR. SEALS:** Your Honor, I think to the extent that it  
7 was simply grievances filed by other inmates, I don't know  
8 that that necessarily needs to be sealed. But I think our  
9 concern was that there was stuff from his personnel file.

10 And we may need to go back and look at it again, and maybe  
11 we could either withdraw or --

12 **THE COURT:** Do you want to just do a supplemental  
13 filing?

14 **MR. SEALS:** Yeah.

15 **THE COURT:** Like withdrawing -- you know, do that by  
16 Friday also. Anything that you no longer think should be  
17 under seal, you can withdraw your motion to seal it.

18 And you know, anything that you do think should be under  
19 seal, you know, you've got to show -- I mean, just to say that  
20 it's confidential is not enough. You have to explain -- I  
21 mean, it's not hard to explain why information from -- private  
22 information from somebody's personnel file should be under  
23 seal. But you need to do it, and you need to be more  
24 discerning about what should be filed under seal.

25 **MR. SEALS:** Okay.

1           **THE COURT:** The last item I have -- oh, are we still  
2 doing jury selection the same day? Is that the current plan?

3           **MR. BENEDETTO:** That is the current plan. The 16th.

4           **THE COURT:** Okay. I do like doing it beforehand  
5 because it's nice for the jury to get picked, and then have  
6 like a couple of days to sort of get their affairs in order.

7           **MS. NYGAARD:** Well, Defendants would object at this  
8 point in time because we have five officers who would need to  
9 travel down from Crescent City to come early for a jury  
10 selection. And I don't know what their availability is like.  
11 It was hard enough for us to come up with the week of November  
12 16th. If they were local I think it would be different, but I  
13 have no idea what their schedules are.

14           **THE COURT:** Okay.

15           **MS. NYGAARD:** Everybody is planning to be here on the  
16 16th.

17           **THE COURT:** Okay, that's fine. We'll do that, then.  
18 And do we have an estimate -- now that we've sort of pared  
19 down the trial a little bit, do we have an estimate about how  
20 long it will last? How many court days you need?

21           (Off-the-Record discussion between counsel)

22           **MS. NYGAARD:** So, we're thinking because we're doing  
23 jury selection on Monday, that we would probably need to go  
24 into that Friday to do closings. So four days, because you're  
25 dark on Thursday.

1           **THE COURT:** Dark -- you're including in that that  
2 we're dark on Thursdays. Okay. That's great.

3           And then, I think you should plan to do -- typically jury  
4 selection in a civil case, we're done by lunchtime. We have a  
5 jury by lunchtime. So you should plan to do your openings  
6 that day. Probably right after -- I'm guessing it'll be right  
7 after lunch.

8           (Off-the-Record discussion between counsel)

9           **MR. BENEDETTO:** Maybe a witness or two?

10          **THE COURT:** And then you should have -- yeah, you  
11 should have your first witness available. If it's a short  
12 witness, you should have two witnesses available.

13          And for opening statements, half an hour each side.

14          The way we'll do jury selection is we will bring about 25  
15 people in here. We will line them all up in order. You will  
16 get a list which shows Juror No. 1, No. 2, No. 3, all the way  
17 down to 25 or 30, or however many it ends up being.

18          So that you will know if you ding No. 5, or if I excuse  
19 No. 5, then No. 6 will ultimately become No. 5. And it'll --  
20 so you'll know that, you know, Prospective Juror No. 22 is  
21 very unlikely to end up on the jury so you're not going to  
22 have to waste, you know, really much time with that person.

23          And, we'll hand -- we'll give the 25 jurors, roughly 25  
24 prospective jurors, the questionnaire.

25          First we'll do hardships, I'll do hardships with them.

1 Then we'll give them the questionnaire that's on my website.  
2 And I'll go through with them verbally, each of them, the  
3 questionnaire. And I'll -- I usually can ask some followup  
4 questions of them during that process.

5 Then I'll probably ask everybody two or three  
6 raise-your-hand questions. And they will be some of the  
7 questions that you have submitted. I'll pick out two or three  
8 of the ones that I think are most important and ask them, you  
9 know, raise-your-hand questions that will be specific to the  
10 case, and get into a dialogue about that.

11 And then we will caucus and discuss for-cause challenges  
12 or for-cause discussions. And I will tell you who I'm  
13 inclined to excuse for cause. And if there is no objection,  
14 we will just go ahead and excuse those people so you don't  
15 have to waste your time during your own voir dire with those  
16 people. But if one of you objects, we will leave them there  
17 so you can try to rehabilitate them or whatever.

18 And, then you can each do -- since you're doing this as  
19 appointed counsel, I'll give you each half an hour for  
20 voir dire, which is longer than I usually give. But you can  
21 each have half an hour for voir dire. And then we'll pick our  
22 jury. And like I said, we should be done right around  
23 lunchtime.

24 Courtroom configuration. So, we -- I'm hopeful that we  
25 can get the video conferencing capability set up in this

1 courtroom. I was initially told that we might not have it set  
2 up for this courtroom, which wouldn't be a big deal, we'd just  
3 do it in some other courtroom on the hallway.

4 But one thing I was thinking about is because Mr. Perez is  
5 a prisoner at Pelican Bay, obviously I don't want to restrict  
6 his movement in the courtroom in any way, but I also don't  
7 want to be -- want the jurors and the prospective jurors to be  
8 freaked out.

9 And so, what I was thinking would be ideal is if the  
10 Plaintiffs sit where the Defendants usually sit, and the  
11 Defendants --

12 **MS. NYGAARD:** Here (Indicating)?

13 **THE COURT:** Yeah and the Defendants sit where  
14 Plaintiffs usually sit. So that way, just in case there are  
15 skittish prospective jurors who are concerned about being, you  
16 know, in close proximity to somebody who is an inmate at  
17 Pelican Bay, that should alleviate their concerns. And so  
18 that's -- if we do a different courtroom, then I think it will  
19 -- it will be fine, probably.

20 I'm going to give this some more thought, but I think it  
21 will be fine for the Defendants to sit at counsel table  
22 closest to the jury box, and the Plaintiffs to sit at counsel  
23 table further from the jury box.

24 But ideally we'll be here, and you all will be there. And  
25 I may give some thought to where the witness stand goes, too,

1 although I'm not sure if we need to worry about that yet or  
2 not.

3 **MR. SEALS:** Have you given any thought to where -- I  
4 believe he'll have some guards with him. So I don't know  
5 where you would want them to be. Just in terms of -- we need  
6 to check with CDCR about where they would want the guards to  
7 be.

8 **THE COURT:** Uh-huh.

9 **MR. SEALS:** I don't know if they would want to be  
10 behind or if they could sit in the back (Indicating), or if  
11 you have any --

12 **THE COURT:** Well, I mean, the number-one concern is I  
13 don't want Mr. Perez to be prejudiced by any of it. But also,  
14 we do have -- I'm concerned about jurors, you know, being  
15 worried. And I'm -- and there is a safety issue that we have  
16 to worry about.

17 And so, you know, I'm going to be flexible, and I trust  
18 that you are going to be flexible on that as well. And if the  
19 -- you know, if the CDCR folks want to come check it out and  
20 talk to us about it, you know, they're more than welcome to do  
21 so. You know, and I invite you all to come as well, if you  
22 would like.

23 **MS. NYGAARD:** They'll probably just figure it out the  
24 morning of. I mean, I've seen it in other courtrooms where,  
25 you know, it was a little different configuration. People

1 were sitting, you know, in the front row right by the table.

2 **THE COURT:** Uh-huh.

3 **MS. NYGAARD:** Or -- you know. But I would defer to  
4 -- and I would hope that the Court would too, and Plaintiff's  
5 counsel, to the discretion of the officers, because, I mean,  
6 they're the ones who are experienced and know what level of  
7 security or closeness that he is going to need.

8 **THE COURT:** Yeah, and I certainly will defer to them,  
9 to a point. But as long as it's not going unfairly prejudice  
10 Mr. Perez.

11 (Note handed up to the Court)

12 **THE COURT:** Oh. And, he's not going to be shackled.  
13 I don't know if that was clear.

14 **MS. NYGAARD:** On the -- on the legs? We would ask  
15 for him to be shackled.

16 **THE COURT:** Thoughts?

17 **MS. NYGAARD:** We would object to not having that  
18 happen. He is a Level 4 maximum-security inmate, Your Honor.  
19 We would not be comfortable having him just sitting here with  
20 nothing on.

21 **MR. BENEDETTO:** We had reached an agreement with the  
22 Defendants that as long as the jury never had a view of  
23 Mr. Perez being visibly shackled, which means --

24 **THE COURT:** Okay.

25 **MR. BENEDETTO:** -- either behind a curtain or --

1           **MS. NYGAARD:** This wall (Indicating).

2           **THE COURT:** Well, this is the perfect courtroom for  
3 that. Right.

4           **MR. BENEDETTO:** Right. As long as they are not  
5 informed that this is typically where the Defendant sits.

6           **THE COURT:** Right.

7           **MR. BENEDETTO:** And also when he testifies, that he  
8 be put in the witness stand before the jury enters the room,  
9 so they don't see him with his legs shackled.

10          **THE COURT:** Okay.

11          **MR. BENEDETTO:** Those are our primary concerns.

12          **MS. NYGAARD:** Right.

13          **MR. BENEDETTO:** Relatedly, I guess I have a question  
14 for Ms. Nygaard, if she knows how the CDCR officers will be  
15 attired.

16          **MS. NYGAARD:** In their uniforms.

17          **THE COURT:** Do they have to be in their uniforms?

18          **MS. NYGAARD:** Yes.

19          **THE COURT:** I mean, you know, I'm less worried about  
20 this in this case than I would be in a criminal case where  
21 somebody's being, you know, accused of a crime. I mean, it's  
22 not a secret a that he -- you know, that Mr. Perez is a  
23 prisoner at Pelican Bay. And it's not a secret that there are  
24 security issues associated with that.

25           So, but why do they need to be in uniform? Just because



1 they need to have their weapons --

2 **MS. NYGAARD:** Yeah, I mean, they are peace officers,  
3 and they need to have their safety equipment on them and, you  
4 know --

5 **THE COURT:** Okay, well, I was just asking because we  
6 often have -- you know, the U.S. Marshal is often in here  
7 without marshals' uniforms on.

8 **MS. NYGAARD:** I have never seen a CDCR officer come  
9 to court without their uniform on. They are going to be  
10 transporting from a prison, driving here. They -- you know,  
11 they need to have everything on.

12 **THE COURT:** Okay.

13 **MR. BENEDETTO:** I mean, we're concerned about the  
14 prejudice to our client, regardless of the stipulation that he  
15 is a prisoner of Pelican Bay. We are not hiding from that.

16 But to the extent that that can be mitigated in some way,  
17 perhaps where they sit, their proximity to Mr. Perez, possibly  
18 their attire, we would be -- we would be concerned about --

19 **THE COURT:** Well, maybe you all could -- with respect  
20 to -- I think it would be worth it, you know, so that we don't  
21 have any, like, issues the morning of jury selection, which is  
22 the last thing that you all need -- I mean, for me, it's not  
23 that big of a deal. I can come out here and sort of make a  
24 decision. But you all don't need that.

25 Maybe you'd rather try and work it out amongst yourselves,

1 see if you can reach agreement about all this stuff. But in  
2 particular, the uniform issue, that's something that needs to  
3 be resolved in advance. And if you're not satisfied on that,  
4 you should file something.

5 I mean, the more I think about it, and the more we talk  
6 about it, my inclination is: He is a prisoner at Pelican Bay,  
7 and pretty much everybody knows what that means. And so we're  
8 not, like, playing a big trick on the jury here by putting  
9 people in plainclothes rather than in their uniforms.

10 But -- and by the way, I mean, I don't know if you  
11 included a proposed instruction about not, you know -- about  
12 not -- you know, that you shouldn't take into account -- I  
13 mean, this will come up, no doubt, during voir dire and stuff,  
14 that: You're not going to hold it against the guy that he's a  
15 prisoner, and you know, prisoners have First-Amendment rights  
16 too. But I don't know if there is an instruction along those  
17 lines.

18 **MR. BENEDETTO:** We did not have -- include such an  
19 instruction.

20 **MR. SEALS:** I think the difficulty with that  
21 instruction is the -- the rule regarding felonies being  
22 evidence of credibility. So...

23 **THE COURT:** Oh, uh-huh. Yeah. Well, but, I'm sure  
24 they're going to say with some regularity that prisoners have  
25 First-Amendment rights too, and you are not going to disagree

1 with that.

2 **MR. BENEDETTO:** That is an instruction.

3 **THE COURT:** What?

4 **MR. BENEDETTO:** That is an instruction.

5 **MR. SEALS:** Exactly.

6 **THE COURT:** That you're not going disagree with that?

7 **MR. BENEDETTO:** No, that prisoners have  
8 First-Amendment rights.

9 **THE COURT:** Yeah. I mean, you know. So I think it  
10 will all be fine. But if you all have any problems, just -- I  
11 mainly just ask you to sort of try to get ahead of problems as  
12 much as possible. And if you need my assistance, to, you  
13 know, file something seeking my assistance.

14 Anything else for today?

15 **MR. BENEDETTO:** I informed Ms. Nygaard that there was  
16 a -- a small error in the Bates label of one of our exhibits.  
17 I informed her of what the new label is.

18 And we will be refileing a corrected version of Exhibit A  
19 to the joint proposed pretrial order.

20 **THE COURT:** Oh, if only everybody was so careful and  
21 exacting in their pretrial preparation.

22 Okay. Very good. So --

23 **MR. BENEDETTO:** And, and finally, on Mr. Guerrero and  
24 Mr. Mendoza, if in fact we go forward with a video conference,  
25 we're going to test that out?

1           **THE COURT:** Yeah, yeah. Certainly. You can  
2 certainly come test that out.

3           Arrange with Kristen.

4           **THE CLERK:** I'll talk with you guys after court.

5           **MS. NYGAARD:** Okay.

6           **MR. BENEDETTO:** One --

7           (Off-the-Record discussion between counsel)

8           **THE COURT:** All right. Anything else?

9           **MR. SEALS:** We were just discussing the possibility  
10 of the exhibits and our objections to the exhibits.

11           Will you address those issues during the course of trial?  
12 Or -- before the first day?

13           **THE COURT:** That's a good question. One thing that  
14 -- I mean, the problem with exhibits and objections to  
15 exhibits and addressing them before trial is that typically  
16 what happens is that, you know, each side includes 500  
17 exhibits on their exhibit list, and objections, and only five  
18 to ten of those exhibits ever end up getting offered if the  
19 first place.

20           So, you know, for me to go through and rule on exhibits  
21 and objections to exhibits now is generally not a good idea.

22           One question is: Have these rulings on the motions in  
23 limine resolved a lot of the issues relating to the exhibits?

24           (Off-the-Record discussion between counsel)

25           **MS. NYGAARD:** Some of them, yes.

1           **THE COURT:** Okay. Another question is: Are there,  
2 like, you know, say, four or five bellwether documents where  
3 if -- you know, documents that you consider really important,  
4 and documents where a similar evidentiary issue is going to  
5 come up with respect to more than one document.

6           You know, what I did in preparation for the last civil  
7 trial is invited the parties to kind of pick among -- you  
8 know, get together and pick four bellwether documents, and do  
9 a joint submission to me, you know, describing the evidentiary  
10 issues raised by those documents.

11          And I could issue a ruling in advance on those, sort of in  
12 the same format that you might have done like jury  
13 instructions, you know.

14          Or, you know, where you're submitting one brief to me  
15 which has each side's arguments on each of the bellwether  
16 documents. You could, like, each pick two or something like  
17 that.

18          If you would like to do that, I would be happy to sort of  
19 help you out that way.

20           **MS. NYGAARD:** One big category that I can think of  
21 right now are articles that Mr. Perez wrote after the cell  
22 search, that we believe if a jury read the contents of those  
23 articles, that it would be overly prejudicial.

24          It's just Mr. Perez's advocacy (Indicating quotation  
25 marks) about the perceived misjustices in the prison system,

1 et cetera, and he uses a lot of inflammatory terms and  
2 languages. Sometimes he has legal conclusions in there. And,  
3 you know, we just -- we believe that the jury reading what he  
4 wrote would be overly prejudicial.

5 Now, the fact that he wrote them, that's different. But  
6 we just believe that actually handing the document to the jury  
7 and letting them read pages and pages of his -- you know, his  
8 statements about how horrible Pelican Bay is and everything,  
9 we just feel --

10 **THE COURT:** Why are those relevant at all? I would  
11 think that you would -- you might be sifting through that and  
12 trying to figure out if there's any admission that he makes in  
13 those writings that you would want to admit.

14 But assuming it wouldn't be like a party admission,  
15 assuming it wouldn't be admissible for that purpose --

16 **MS. NYGAARD:** No, there's nothing about Defendants in  
17 them.

18 **THE COURT:** So, I mean, it's hearsay. Right?

19 What exception would that fall under? Why would you want  
20 to --

21 **MR. BENEDETTO:** I think there's a state-of-mind  
22 exception. And, we also would have to sort of think about  
23 these articles in light of the Court's ruling today on the  
24 other First Amendment activities.

25 **THE COURT:** Uh-huh.

1           **MR. BENEDETTO:** And how we would seek to use them.

2           **THE COURT:** Uh-huh.

3           **MR. BENEDETTO:** We believe that they -- the  
4 post-October articles are evidence of the fact that there  
5 would be similar articles in his cell on the day of the cell  
6 search.

7           But, you know, we would have to really think about whether  
8 we -- how we would use them in light of the bifurcation and in  
9 light of the --

10           **THE COURT:** Yeah. My pure gut reaction -- take it  
11 for no more than that, but you know, I mean, if it were stuff  
12 -- I mean, if there was an allegation -- if there was an  
13 implication or an allegation that he's just now making this  
14 stuff up, and then it's prior -- prior consistent statement.  
15 But that's not what it's going to be about.

16           So anyway, I'm sort of left wondering what -- you know.  
17 You mentioned state of mind. Maybe it's more relevant in the  
18 second phase. I don't know. I mean, but anyway, that'll be  
19 something to think about.

20           If you want those to be part of your bellwether documents,  
21 you can pick one example. You don't have to, you know, seek a  
22 ruling on all of them.

23           **MS. NYGAARD:** Right.

24           **THE COURT:** Pick an example and an exemplar. And,  
25 you know, pick that as one of your documents and submit it,

1 seek a ruling.

2 **MS. NYGAARD:** Okay. And I think Defendants had  
3 another question about how Your Honor prefers to have  
4 witnesses called.

5 If Defendants are called in Plaintiff's case-in-chief, do  
6 you prefer them to just only be on the stand once? Or do we  
7 get to call them in our case-in-chief later?

8 **THE COURT:** I think that you should -- they should be  
9 -- I mean for their sake, they should be on the stand once. I  
10 mean, I don't see why -- I mean, if they called one of the  
11 Defendants, you can get up and do your direct of them.

12 **MS. NYGAARD:** Okay.

13 **THE COURT:** Yeah. Anything else?

14 **MR. SEALS:** (Shakes head)

15 **MR. BENEDETTO:** No, Your Honor.

16 **THE COURT:** Okay. Great. Thanks very much.

17 So I will see you -- oh. I think I've said this before.  
18 I don't care at all whether you want to settle, whether you  
19 want to go to a Magistrate Judge, doesn't matter to me. My  
20 job is to preside over trials. I'm happy to do this one.  
21 Kind of looking forward to it, actually.

22 But, do you want to? If both sides wish to go back to --  
23 Judge Vadas?

24 **MR. LEE:** (Shakes head)

25 **THE COURT:** No? Okay. Good. See you on the 16th,



1 then.

2 **MR. BENEDETTO:** Thank you, Your Honor.

3 **MS. NYGAARD:** Thank you, Your Honor.

4 **MR. LEE:** Thank you, Your Honor.

5 **THE CLERK:** Court is adjourned.

6 (Conclusion of Proceedings)

**CERTIFICATE OF REPORTER**

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Belle Ball 

Monday, November 9, 2015

Belle Ball, CSR 8785, CRR, RDR